

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: December 31, 2008

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Graphic Communications Conference,
International Brotherhood of Teamsters
(Santa Barbara News-Press)
Cases 31-CC-2169, 31-CC-2170,
31-CC-2171, 31-CB-12427, 31-CB-12429

The Region submitted these cases for advice on whether the Union: (1) violated Section 8(b)(4)(i)(ii)(B) by requesting that neutral businesses cease advertising in the Santa Barbara News Press (SBNP) and by distributing handbills calling for a boycott of neutrals who did not agree to cease advertising; (2) violated Section 8(b)(4)(i)(B) by certain statements to employees of the neutral employers; and (3) violated Sections 8(b)(4)(i)(ii)(B), 8(b)(1)(A), 8(b)(3), and 8(d) by other statements and conduct in conjunction with the Union's advertiser boycott. We conclude that the Region should issue a merit dismissal of the Section 8(b)(4)(i)(B) charge regarding a Union agent's July 8 statement to Hot Springs Spa and Patio employee Sanchez and that the Region should dismiss all other charges.

I. Case 31-CC-2169

In conjunction with the Union's larger labor dispute with the SBNP, during the summer of 2008 the Union began contacting local businesses who advertised in the SBNP. The Union asked them to cease advertising at least for a period of time, warning that it would boycott advertisers who did not comply. Case 31-CC-2169 involved Union contacts with five specific businesses, handbilling at three of these businesses, and a letter requesting management of several of the businesses to stop advertising in the SBNP.

Hot Springs Spa and Patio, July 9-11

FACTS

On July 8, 2008,¹ four or five Union representatives entered the Hot Springs Spa and Patio store, where employee Sanchez was alone. According to Sanchez, the Teamsters stood in front of and around him, spoke all at once, and said they were trying to get people to pull their ads from SBNP. One Union agent told Sanchez that he should not be working for somebody who associates themselves with the News-Press. Sanchez felt intimidated by the men's size, number, assertiveness, and moved to within view of a security camera. One man handed Sanchez a business card and a boycott flyer. The flyer named Spa but included a disclaimer of any dispute with Spa. Sanchez did not stop working for Spa.

The next day, Sanchez gave the business card and the flyer to Jones, Spa's owner. Jones called Business Agent Peralta and spoke to him and another Union agent for about 30 minutes. Jones told Peralta not to talk to an employee who has nothing to do with advertising. Peralta explained the reasons for the Union's appeals to advertisers and their customers, but Jones declined to stop advertising in the SBNP. Jones disputed Peralta's suggestion that the SBNP would offer him cheaper ads if he stopped advertising, argued that the Teamsters were trying to hurt his business by distributing flyers, and told Peralta that if he felt he was being forced to take action, he would probably do the opposite. Peralta said that if Jones wrote a letter to the SBNP, the Teamsters wouldn't distribute their boycott flyer for 30 days. Jones refused to stop advertising for 30 days during the busy season.

ACTION

We conclude, in agreement with the Region, that the Union agent's July 8 statement that Sanchez should not work for someone who associated themselves with the SBNP constituted an inducement to withhold services from a neutral employer in violation of Section 8(b)(4)(i)(B). We also agree that the Union's other activity in the store on July 8, and afterward in the phone call with Jones, did not violate 8(b)(4)(ii)(B).

Section 8(b)(4)(B) makes it unlawful for a labor organization or its agents (i) to induce or encourage

¹ All dates are in 2008.

employees to withhold services from their employer, or (ii) to threaten, coerce, or restrain any person, where an object is for that person to cease doing business with another employer.

The Teamsters' statement to Sanchez that he should not work for somebody who associates themselves with the News-Press constituted an unlawful inducement to Sanchez to cease working for Spa. The mere fact that this inducement was unsuccessful does not make it lawful. However, in the absence of any similar violations, we conclude that further proceedings of this isolated violation would not effectuate the purposes and policies of the Act. Accordingly, the Region should issue a merit dismissal of this charge, absent withdrawal.

We also conclude that the Region should dismiss the 8(b)(4)(ii)(B) allegation concerning the Union's conduct regarding the Spa, absent withdrawal. The Union agents did not threaten, coerce, or restrain Jones or any other representative of the Spa.² Nothing in Jones's telephone conversation with Peralta and another Union agent was threatening, coercive, or restraining. Further, contrary to the SBNP's allegations, there is no evidence that the Union stated or implied any intent to economically crush neutral parties, or that the Spa would be economically crushed if it stopped advertising in the SBNP.³ In sum, the Union's efforts to obtain Jones' compliance with the boycott constituted lawful economic pressure.

² The Union only induced Sanchez not to work; it did not threaten, coerce, or restrain him.

³ Absent evidence that the Union's boycott effort would have a ruinous likely economic effect on the neutral Spa, we find distinguishable NLRB v. Retail Store Employees Union (Safeco), Local 1001, 447 U.S. 607 (1980) (Union picketing of neutral title insurance companies who derived 90 percent of their revenue from the primary employer title insurance underwriter violated 8(b)(4)(ii)(B) because product boycott threatened the neutral title insurance companies with financial ruin). Safeco is also distinguishable in that it involved coercive Union picketing.

Chuck's Steakhouse of Hawaii, July 8-10

FACTS

On July 8, four Union agents were waiting on the steps of Chuck's when manager Schuette opened the restaurant. The Union agents entered the restaurant and spoke to Schuette for about three minutes, telling him that if he didn't stop advertising in the SBNP they would protest. Schuette responded that if they did, he would call the police.

Upon leaving the restaurant, the Union agents handbilled for about two hours: they waved flyers in the air to flag down cars that were passing or turning into the driveway, then they motioned the drivers to roll down windows, and handed them flyers. The handbillers mostly stood in the center of a public sidewalk in front of the restaurant's steps, with one handbiller at a time approaching cars from a point on the edge of the public sidewalk and driveway. The handbillers displayed no signs and not engage in any patrolling nor spoke to any employees. At least once, a handbiller told a driver that he or she shouldn't patronize Chuck's because it advertises with the SBNP.

One customer told Schuette that he was handed a flyer by a man on the restaurant's front stairs, which is private property. No customers complained of being intimidated, threatened, or coerced. Schuette summoned the police regarding his concern that the handbillers' pulling cars over was unsafe and the officer said he would talk to the handbillers. Schuette did not see the officer do so, but about 30 minutes later, the handbillers left. No police report was filed.⁴

On July 10, Schuette saw two individuals engaging in the same conduct and distributing the same flyers as on July 8, for at most one hour. As on July 8, the handbilling involved no signs or patrolling.⁵ One

⁴ Concerning the allegations of unlawful handbilling at Chuck's on July 9, we agree with the Region that these allegations were supported only by hearsay testimony. In any event, these allegations do not demonstrate any unlawful conduct on that date.

⁵ The property manager videotaped the handbillers on July 10; his video shows no patrolling or blocking and just the waving of flyers.

handbiller apparently took a cell phone photo of the individual who was videotaping. At that time, there were no other individuals nearby, so the Union's apparent photographing would not depicted any distribution of handbills nor have been have seen by others. Schuette did not cease advertising in the SBNP.

ACTION

We agree with the Region that the handbilling and related conduct at Chuck's on July 8 and 10 did not violate 8(b)(4)(ii)(B). Contrary to the SBNP's allegations that the Union's activities constituted unlawful threatening, picketing, disruptive handbilling, and trespassing, there is no evidence of picketing or trespassing, and the handbilling and threat to Schuette that the Union would protest his advertising in SBNP were lawful.

Traditional union picketing involves individuals patrolling while carrying placards attached to sticks. Such union conduct at or near the entrance of a neutral employer urging a consumer boycott is secondary coercive conduct in violation of Section 8(b)(4)(ii)(B).⁶ The Board has long held, however, that the presence of traditional picket signs and/or patrolling is not a prerequisite for finding that a union's conduct is the equivalent of traditional picketing.⁷ The "important feature of picketing appears to be the posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business."⁸

The peaceful distribution of handbills at or near the entrance of a neutral employer urging a consumer boycott is

⁶ See, e.g., Safeco, supra, 447 U.S. at 614-615; Operating Engineers Local 139 (Oak Constr., Inc.), 226 NLRB 759, 759 (1976); Cement Masons Local 337 (California Assn. of Employers), 192 NLRB 377, 377 (1971), enfd. 468 F.2d 1187, 1191 (9th Cir. 1972), cert. denied 411 U.S. 986 (1973); Nashville Bldg. & Constr. Trades Council (Castner-Knott Dry Goods Store), 188 NLRB 470, 471 (1971).

⁷ See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968), citing Lumber & Sawmill Workers Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965).

⁸ Stoltze Land & Lumber Co., 156 NLRB at 394.

not coercive and does not violate Section 8(b)(4)(ii)(B).⁹ The distinction between picketing and handbilling is that picketing includes a conduct element that may evoke the union's desired response irrespective of any accompanying message.¹⁰

In assessing whether secondary activity constituted picketing that violated Section 8(b)(4)(ii)(B), the Board has stated, "[o]ne of the necessary conditions of picketing is a confrontation in some form between union members and [persons] trying to enter the employer's premises."¹¹ Thus, in William J. Burns Detective Agency, the union violated 8(b)(4)(ii)(B) when 20 to 70 of its members marched in an elliptical path and impeded access to the neutral employer's facility while distributing handbills.¹² The Board stated that "[w]hether or not the conduct under consideration is held to constitute picketing . . . [it] overstepped the bounds of propriety and went beyond persuasion so that it became coercive to a very substantial degree."¹³ Similarly, in New Beckley Mining, the union violated 8(b)(4)(ii)(B) when 50 to 140 of its members assembled at 4 a.m. outside of a neutral motel seeking the removal of striker replacements staying there.¹⁴ This "mass activity" was held to constitute picketing, even though no picket signs were used, where it coerced the neutral motel to cease doing business with the primary employer who had provided the striker replacements.¹⁵ On the other hand, Section 8(b)(4)(ii)(B), permits appeals or requests to management to make the business judgment to cease doing

⁹ See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 578 (1988).

¹⁰ Id. at 580.

¹¹ Chicago Typographical Union No. 16 (Alden Press, Inc.), 151 NLRB 1666, 1669 (1965).

¹² Service & Maintenance Employees Local 399 (William J. Burns Intl. Detective Agency, Inc.), 136 NLRB 431, 437 (1962).

¹³ Id.

¹⁴ Mine Workers (New Beckley Mining), 304 NLRB 71, 71-72 & n.5 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992).

¹⁵ Id., 304 NLRB at 72.

business with a primary, as well as threats to engage in protected activity to enlist neutral employers' support.¹⁶

The concept of "signal picketing" was developed by the Board to describe union conduct that did not involve traditional picketing, but could be characterized as such because it evoked the same response as a traditional picket line. In other words, "'[s]ignal picketing' . . . describe[s] activity short of a true picket line that acts as a signal to neutrals that sympathetic action on their part is desired by the union."¹⁷ By directing such conduct at neutrals, a union can violate 8(b)(4)(i) and (ii)(B).¹⁸

¹⁶ See NLRB v. Servette, Inc., 377 U.S. 46 (1964). In Servette, union representatives of employees of a wholesale distributor, Servette, did not violate Section 8(b)(4)(i)(B) of the Act when they asked supermarket managers, who were customers of the primary employer Servette, to support a strike and to cease doing business with the primary employer. The union threatened to distribute handbills asking store patrons to not purchase specified items distributed by the distributor Servette. The Court held that to ask supermarket managers to refuse to handle the primary Servette's products did not constitute an unlawful attempt "to induce or encourage them to cease performing their managerial duties in order to force their employers to cease doing business with Servette." 377 U.S. at 50-51. Instead, the Court said that the union appeals to the managers constituted appeals to ask them to make a managerial decision within their own authority. Thus, the Court explained, appeals to employees of a secondary employer for voluntary cooperation, unaccompanied by threats, coercion, or restraints, were lawful. Id. at 54.

¹⁷ Operating Engineers Local 12 (Hensel Phelps), 284 NLRB 246, 248 fn. 3 (1987) (citation omitted). Accord: Electrical Workers, Local 98 (Telephone Man), 327 NLRB 593, 593 and fn. 3 (1999) (finding "signal picketing" at neutral gate where, among other things, union agent stood near gate and wore observer sign that flipped over to reveal same sign being used by union picketers at primary gate).

¹⁸ See generally Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 743 (1993). Nevertheless, some federal courts have rejected the notion that the concept of signal picketing, which relies on communications to employees, could apply to a consumer boycott appeal made to the general public. See Overstreet v. Carpenters Local 1506, 409 F.3d 1109, 1215 (9th Cir. 2005); Gold v. Mid-Atlantic Regional Council of Carpenters, 407 F. Supp.2d

We conclude that the Union's conduct at Chuck's constituted lawful handbilling and not picketing, signal picketing, or other coercive conduct. The handbilling involved no signs or placards but merely waving of flyers to attract attention. The handbillers engaged in no organized patrolling nor any mass activity. Any slowing of traffic entering the parking lot was merely the ordinary incidental result of lawful handbilling. The Union also engaged in no confrontational or threatening conduct. The handbiller statement that a customer should not patronize Chuck's was a mere request for support and not a threat. The alleged trespassing by being on the privately-owned stairs was supported only by hearsay.¹⁹ Finally, the Union's statements to Schuette that they would protest if he did not cease advertising in the SBNP were lawful warnings that the Union would engage in lawful conduct, consistent with Servette.²⁰

In sum, the Region should dismiss the Section 8(b)(4)(ii)(B) allegations regarding the Union's conduct and statements at Chuck's.

Santa Barbara Home Improvement Center, July 9-11

FACTS

On July 9, four Union agents visited HIC and asked assistant store manager Vallin whether she was in charge of advertising; she answered that manager Owens was. The agents told Vallin that her company should not advertise with the Santa Barbara News-Press and that if HIC continued to advertise, they could stand outside the store and boycott it. Vallin advised them to make an appointment to speak to Owens because she didn't know if he would be available otherwise. One agent expressed confidence that Owens would speak to them.

719, 728 (D.Md 2005) Kohn v. Southwest Regional Council of Carpenters, 289 F. Supp.2d 1155, 1165, n.5 (C.D. Cal 2003).

¹⁹ In any event, brief trespassory conduct by itself does not violate Section 8(b)(4)(ii)(B). See Detroit Metropolitan Council of Newspaper Unions (Detroit Newspaper Agency), 7-CC-1678, Advice Memorandum dated March 25, 1997.

²⁰ Servette, 377 U.S. at 57 ("The statutory protection for the distribution of handbills would be undermined if a threat to engage in protected conduct were not itself protected.").

Vallin states that she was nervous because one Union agent, who gave Vallin his business card and a boycott flyer, was a large individual who spoke loudly when he approached her. The conversation lasted about 5 minutes. No police report was filed.

On July 10, Vallin reported the previous day's events to Owens. Owens called the SBNP's director of advertising and told him that Owens did not want to be involved in anything and did not want the Teamsters to come back. However, Owens did not say that he would stop advertising in the SBNP.

On July 11, Business Agent Peralta and another Union agent spoke to Owens in the store while a third agent distributed handbills outside. Owens said that he didn't want to take sides, but Peralta said he was taking sides by advertising. Owens said not advertising would hurt the business and its employees. Peralta mentioned boycotting the store and also said he wanted Owens to call the SBNP. Owens told Peralta that he had already called but didn't tell Peralta what he had said in that call.

Owens states that he felt intimidated and understood from the flyer that the Union meant to hurt his business. This conversation lasted about two or three minutes. Owens then walked the Union agents out of his office and told them that a secondary boycott would be illegal; Peralta disagreed. They all walked out to the HIC parking lot.

About the same time that Owens was meeting with Peralta and the other Union agent inside HIC, the store's assistant operations manager Bronson saw a man, who wore no Union insignia, in the store's private parking lot, carrying a stack of flyers. Bronson saw the man give a flyer and talk to a customer for about 15 seconds. Bronson informed the handbiller that he was on private property and instructed him to move to the public sidewalk. The handbiller did not move until Bronson repeated the instruction several times, finally threatening to call the authorities. The interaction lasted five minutes, during which both parties remained calm without raised voices. Bronson went inside the store and told Owens that there were handbillers outside and inside the store.

Bronson and HIC owner Simpson went outside and found the handbiller talking to a customer. Simpson told the handbiller that he didn't want handbilling on private property, and the handbiller said he understood. The customer told Simpson that the handbiller was entitled to freedom of speech; Simpson responded that it was

inappropriate for the Union agent to engage customers to harm the business because of its SBNP advertising.

Peralta and other agent meeting in Owens' office approached the sidewalk with Owens. Simpson told Peralta that he didn't appreciate having leaflets distributed in his store and that his advertising in SBNP helped his business and his employees. Peralta informed him that they would be back.

The above incidents did not involve any picket signs or banners, police calls or reports, photos or security involvement. No work stoppage resulted from the incident, and there was no impact on or disruption of any delivery. HIC did not stop advertising in the SBNP.

ACTION

We agree with the Region that the conversations, handbilling and related conduct at HIC between July 9 and 11 did not violate 8(b)(4)(ii)(B). Contrary to the SBNP's allegations that the Union's activities constituted unlawful threatening, picketing, disruptive handbilling, and trespassing, there is no evidence of picketing, any brief trespassing that occurred did not violate the Act, and the handbilling and threat to boycott were lawful.

As discussed above, noncoercive handbilling, even with regard to the boycott of a neutral employer, does not violate Section 8(b)(4)(ii)(B).²¹ Warnings of the intent to engage in such handbilling are also not coercive.²² The mere presence of Union agents, who were large individuals who spoke loudly, does not constitute coercive conduct.

Similarly, the trespassory nature of otherwise lawful and noncoercive handbilling does not by itself violate 8(b)(4)(ii)(B). In Detroit Newspaper Agency, we found no violation where groups of union agents milled around automobile dealerships that advertised in the struck newspaper, even where those union agents did not immediately respond to requests that they leave the dealerships' property.²³ In that case, there was no evidence that the union agents interfered with the

²¹ See DeBartolo, supra, 458 U.S. 568 (1988); Servette, supra.

²² See Servette, supra.

²³ Detroit Metropolitan Council of Newspaper Unions (Detroit Newspaper Agency), supra.

employers' operations, interfered with customers' access, or made derogatory comments about the dealers' products or services. The union agents were present on the employer's premises as business invitees and, in one case, left voluntarily after they initially had refused to leave.²⁴

Regarding July 9, the mere presence of large and loud Union agents did not constitute a threat; the threat of a boycott was lawful under Servette; and there was no evidence of any handbilling of customers or employees in or around the store on that date. Regarding July 11, similarly the Union agents' mere presence was not a threat; and the handbill distribution was noncoercive and lawful, making their threats to handbill including their threat to come back and handbill again also lawful under Servette. Finally, consistent with Detroit Newspaper Agency and Service By Medallion, supra, the outside handbiller's brief handbilling in HIC's private parking lot and refusal to leave immediately does not fall within Section 8(b)(4)(ii)(B) absent other coercive conduct. We therefore agree with the Region's recommendation to dismiss the allegations regarding the July events at HIC.

Filipinni Financial Group, July 18

FACTS

According to President Filipinni, he was alone in the office when two large Union agents confronted him in the office's doorway and asked to speak to the person in charge of advertising.²⁵ Filipinni responded that the people in charge of advertising were gone. He then squeezed between the large men in order to exit to the parking lot. The Union agents followed him, and one of them told Filipinni

²⁴ We also noted that the mere possibility that customers might feel coerced or intimidated because the demonstrators were inside the Employers' showrooms, standing alone, was insufficient to render the demonstrators' conduct unlawful, citing Chicago Typographical Local 16 (Alden Press), 151 NLRB 1666 (1965)). See also Service Employees International Union Local 1877 (Service By Medallion), 32-CC-1367, Advice Memorandum dated August 24, 1993 (where union representatives' conduct was non confrontational, mere fact that union representatives' were trespassing was not coercive within the meaning of Section 8(b)(ii)(4)(B)).

²⁵ According to Filipinni, the Union agents had to have gone through private property to get to the door of his office.

that they would stage a boycott if he didn't stop advertising in the SBNP. Filipinni told the Union agents that he planned to call the Cappello law firm to tell them what happened; they laughed and said to tell Barry Cappello hello. The Union agents followed Filipinni to his car, but Filipinni had no difficulty getting access to the car to drop off some papers or returning to the office. The Union agents did not follow Filipinni back to the office.

Filipinni states that he felt intimidated by the men's body language, standing side by side near him and leaning toward him and speaking in low-pitched voices; by their failure to identify themselves initially; and by their threat of a boycott because it was a vague threat and the agents were following him at the time.²⁶ The Union agents did not carry signs, nor engage in any handbilling. No police report was filed.

ACTION

We conclude, in agreement with the Region, that the Union agents' conduct at Filipinni Financial Group did not constitute threatening, picketing, unlawful handbilling, or trespassing in violation of Section 8(b)(4)(ii)(B).

Contrary to the SBNP's assertions, there is no evidence of any picketing or handbilling. There also is no evidence that the Union agents' waiting in front of the office constituted signal picketing nor that they confronted any entering or exiting customer or employee. Filipinni was not blocked from exiting the office but at most was delayed slightly by having to squeeze past the Union agents. The Union agents made no threats and only announced that they would conduct a lawful boycott of the business if Filipinni continued to advertise in the SBNP. Although Filipinni stated that he was not in charge of advertising, as the president of the business, he would have controlled such decisions by overseeing the business, including its advertising. Finally, as discussed above, any brief trespassing that may have occurred is insufficient to make otherwise lawful conduct violative of 8(b)(4)(ii)(B).

²⁶ Filipinni is 6' tall and weighs 215 pounds, while the two Union agents were about 6'1" to 6'3" and weighed 250-300 pounds.

Eyeglass Factory, Mid-July

FACTS

According to employee Morales, she was alone in the front part of the store working behind the counter when three men came in and one asked for the owner, Feldman. Morales said he was out and didn't think he'd be back. The man gave Morales a business card, said he was from the Teamsters, and asked her to give the business card to her employer. One of the men stared at Morales as if he was about to say something. After the other two men left, this man stayed until the second man called to him to go. These events lasted about 10 minutes.

Two minutes later, the third man who had stared at Morales returned and gave Morales a flyer, told her to give it to the owner, and explained that the reason they were there was because they were boycotting the News-Press. According to Morales, the man stood and stared at Morales as if he was unhappy with her, didn't say anything, and then left. The third man's return to the store lasted about five minutes, of which 3-4 minutes was spent waiting while Morales helped another customer.

Morales states that she perceived that the three men were on a mission. Morales gave the flyer to the owner's clerk and has not seen these men or other Union agents since the incident. No police report was filed.

ACTION

We conclude that the SBNP's allegation that the Union violated 8(b)(4)(ii)(B) by threatening Morales should be dismissed. Handing Morales a boycott flyer and asking her to give it to the owner who apparently has authority over advertising is lawful under Servette, supra.²⁷ The threat to boycott is also a lawful Servette warning of protected conduct. The Union agents engaged in no other conduct that was threatening.

²⁷ SBNP cited no precedent holding that large Union agents staring at a neutral's employee violates 8(b)(4)(ii)(B).

Letter to Neutral Employers, August 5

FACTS

On August 5, the Union sent neutral businesses a letter asking that they cease advertising with SBNP.²⁸ A copy of the Union's July 21 letter to employees was attached.²⁹ Recipients of the August 5 letter include the Spa, Filipinni Financial Group, and Eyeglass Factory.

ACTION

The Union's August 5 letters, constituting requests to managers to exercise their discretion by not advertising in the SBNP, were lawful under Servette, supra. Although the SBNP alleges unspecified threats of retaliation and unspecified misrepresentations in the letters, we conclude that the letters were not coercive nor maliciously false and thus fell within the protection of Section 8(c).³⁰

In Venetian Casino,³¹ we found that 8(c) protected a union's "Notice" which reproduced the parties' bilateral settlement agreement setting forth the view or argument of the regional office and the union that the Venetian had

²⁸ The letter stated, in relevant part: "We are asking you as an advertiser to inform the Publisher that consistent with your commitments to your customers in the community and your business agreement with the *News-Press*, you intend to pull your ads until such time as the parties reach an agreement on reasonable terms for a contract that will bring stability to the newsroom at the paper. Since the negotiations began last November, the Publisher has failed to honor her legal obligations to bargain in good faith with the Union. In fact, the National Labor Relations Board's General Counsel has announced it will prosecute the *News-Press* for *Bad Faith Bargaining*."

²⁹ The letter to employees addressed the need to continue boycotting SBNP advertisers to pressure SBNP to change its bargaining stance.

³⁰ Section 8(c) applies to unions as well as employers. See NLRB v. IBEW Local 3, 828 F.2d 936 (2d Cir. 1987).

³¹ Culinary Workers Local 226 (Venetian Casino Resort), Case 28-CB-5928, Advice Memorandum dated June 16, 2003.

violated the Act. We noted that the "Notice" contained no threat or promise of benefit and rather constituted a mere noncoercive handbill.

The SBNP has not specified the statements in the Union's letters that would constitute threats of retaliation. In any event, here as in Venetian Casino, the letter contained no threats. To the extent that the letters discuss potential consequences of the ongoing dispute between the Union and the SBNP, those statements are not threats but rather constitute protected opinions within 8(c).

Regarding the alleged misrepresentations, the Board has held that distribution of handbills containing misleading but otherwise accurate information is not restraint or coercion under Section 8(b)(4)(ii)(B) in the absence of "violence, picketing, patrolling or work stoppage."³² As discussed above and further below, there is no evidence of violence, picketing, patrolling, or work stoppage in these cases. The SBNP has not specified which statements in the letters it considers to be coercive misrepresentations. To the extent the SBNP may be relying on the statement that the Board's General Counsel announced it will prosecute the SBNP for bad faith bargaining, accusations of wrongdoing constitute mere opinions that cannot be "knowingly false."³³ Finally, to the extent that the SBNP may be relying on the Union's characterizations of its dealings with the SBNP, such statements also fall within the protection of 8(c).

³² Service Employees Local 399 (Delta Air Lines), 293 NLRB 602, 603 (1989) (untruthful union handbilling not "coercive" relying on DeBartolo).

³³ See, Boxtree Restaurant & Hotel, Case 2-CA-27912, Advice Memorandum dated March 20, 1995 (concluding that 8(c) protected accusations that the Employer violated various labor laws and building codes).

II. Cases 31-CC-2170, 31-CB-12429, and 31-CC-2171

These cases involve additional Union boycotting conduct at HIC alleged to violate Sections 8(b)(4)(ii)(B) and 8(b)(1)(A). The SBNP also alleges that the Union's conduct evinced bad faith bargaining in violation of Section 8(b)(3).

FACTS

On September 9, about four Union agents returned to HIC and handbilled for about 3½ hours. Union agents stood at parking lot entrances and exits; where there was no sidewalk, a handbiller stood in the street. One handbiller who had handbilled outside HIC on July 11 while Peralta and another Union agent were meeting with manager Owens inside the store accused Owens and unspecified other people of lying to the investigator. Owens assumed he meant the Board investigator and asked what they had lied about. Peralta answered in a smug tone that Owens would find out soon enough.

Owens states that he felt threatened by Peralta's and the other handbiller's statements. However, Owens remained in the parking lot, staying about five feet from the handbiller for about two hours, bantering with Peralta and the handbiller. When a handbiller gave a flyer to a customer, Owens also handed the customer HIC's responsive flyer. Other HIC managers and employees were doing the same at other entrances and exits.

During the handbilling on September 9, Owens asked why the Union was trying to hurt his employees, said he would not stop advertising, and asked why the Union agents did not go somewhere else. The Union agents responded that they had a lot of businesses to go to, and they were not going to leave HIC out. Discussion ensued about whether handbilling in the driveways was safe; the unnamed handbiller and a customer talked about safety and about the customer's perception she had to take a handbill from the Union.

Owens states that entering or exiting traffic was impeded about 20-25 times, but the delay was usually only 15-30 seconds. The longest delay Owens saw was at the exits for about a minute. Owens was unaware of any other businesses being handbilled by the Union that week. Owens thus states that HIC was being targeted [FOIA Exemptions 6 and 7(c)].

On September 10 for about two hours, four or five handbillers including Peralta and the unnamed handbiller from September 9 and July 11 returned to HIC and distributed flyers in the same locations as on the previous day. Owens states that the handbillers were less vigorous in their distribution efforts and fewer customers took handbills. The unnamed handbiller accused Owens and unspecified others of being liars regarding a news story about the September 9 handbilling that appeared in the SBNP on September 10. That article quoted Simpson and contained a photograph showing cars lined up in HIC's parking lot.

During the September 10 handbilling, a customer while driving in shouted and swore at the unnamed handbiller. The customer walked over to the handbiller swearing and screaming about unions ruining America. The customer then struck the handbillers' pile of handbills and possibly also the handbiller, and threw a crumpled flyer at the handbiller. Owens states that the incident was not provoked by the handbiller and that the customer seemed out of control and irrational. Both the handbiller and the customer called the police. The handbiller filed a police report and insisted that the customer be prosecuted for assault. SBNP also produced an unauthenticated photograph of a backup of 4-6 cars at one parking lot exit.

ACTION

We conclude that the Region should dismiss the Section 8(b)(4)(i)(ii)(B) and 8(b)(1)(A) allegations in Cases 21-CC-2170, 31-CB-12429, and 31-CC-2171 absent withdrawal, for the following reasons.

Regarding Cases 31-CC-2170 and 31-CB-12429, the Union's accusation of lying by HIC representatives, in the absence of a threat or promise of benefits, is a statement of opinion protected by 8(c). There is no other evidence of coercive witness tampering or coercive witness intimidation.³⁴

Neither the accusation of lying, nor Peralta's allegedly smug statement that Owens would find out soon

³⁴ Consistent with normal investigatory procedure, the Region gave the Union sufficient information about the allegations against it to allow it to respond. Combining that limited information with HIC owner Simpson's own statements in the SBNP, the Union reasonably concluded that the allegations it considered lies must have come from HIC witnesses.

enough what the Union thought the HIC witnesses lied about, constituted a threat of reprisal. Accusations of wrongdoing constitute mere opinions and Peralta neither stated nor implied that he would take any retaliatory action against HIC, Owens, or anyone else. None of the Union agents' other conduct was threatening. Owens' allegation that he was intimidated is undermined by Owens' staying and bantering with the unnamed handbiller and Peralta for two hours. There also is no evidence that the Union targeted HIC because of its participation in Board investigatory processes. In any event, the Union's non-coercive handbilling did not constitute coercive conduct. In sum, the statements did not threaten, restrain, or coerce Owens, and thus did not violate 8(b)(4) (ii) (B).

With regard to the 8(b)(1)(A) allegation in Case 31-CB-12429, Union conduct that restrains or coerces an employee's access to the Board violates 8(b)(1)(A).³⁵ However, a violation of 8(b)(1)(A) requires that the coerced or restrained individual be a statutory employee. Here, the Union's statements were directed at Owens who is a manager and not an employee.³⁶ There is no evidence that the statements were heard by or communicated to any statutory employee. Even if the statements had been directed at or heard by an employee, we have concluded that these statements were expressions of opinion protected by 8(c), and not coercive threats.

Finally, regarding Case 31-CC-2171, the Union's continued handbilling at HIC was not an inducement to any neutral employees or other individuals to strike or refuse to work, and it was not coercive or otherwise violative of 8(b)(4)(i)(ii)(B).

³⁵ Plumbers and Pipefitters Local 524, Case 4-CB-7986, Advice Memorandum dated January 27, 1998; see also UMW Local 1058 (Beth Energy Corp.), 299 NLRB 389 (1990), enforcement denied on question of agency, 957 F.2d 149 (4th Cir. 1992).

³⁶ See IATSE Local 160 (Cinema World, Inc.), Cases 8-CC-1481 et al., Advice Memorandum dated October 30, 1992, at page 6, fn. 7. In contrast, the cases relied on by the SBNP involve statements made to statutory employees. See, e.g., Lear-Siegler Management Corp., a subsidiary of Aerospace Products Holding Corp., 306 NLRB 393, 393-394 (1992); see also U.S. Dept. of the Air Force, Robins Air Force Base (AFGE Local 987), 59 FLRA 542 (2003) (distinguishable on various bases, including that threat at issue was addressed to protected employee).

Contrary to the SBNP's allegations, there was no picketing at HIC in September but rather only lawful handbilling. There is no evidence of inducement or signal picketing nor were there mass gatherings or other coercive conduct. Further, there is no evidence that customers or staff were intimidated by the handbilling. Any backups in entering and exiting the parking lot were minor, ordinary delays incidental to the handbilling, and also exacerbated by the HIC's own handbilling. There is no evidence of any intentional blocking of entry and exit, and the handbillers' pacing and making their presence known to customers was not patrolling but rather conduct incidental to handbilling.

The alleged intimidation of customers at HIC apparently involve one customer on September 9 who perceived that she had to take a handbill while driving into the parking lot. However, this mere subjective perception evidence does not demonstrate coercive intimidation from otherwise lawful handbilling. Finally for all these reasons, the SBNP's cited Board cases regarding signal picketing and other coercive conduct are all clearly distinguishable.

Case 31-CB-12427

FACTS

The SBNP alleges that the Union failed to bargain in good faith in violation of 8(b)(3) and 8(d), based on the Union's secondary handbilling and boycott, and related events. Specifically, the SBNP asserts that the Union's bad faith is demonstrated by: (1) the Union's admission during bargaining that the boycott was intended to force the SBNP to reach a fair contract; (2) a Union flyer inaccurately stating that the Board had charged the SBNP with bad-faith bargaining; (3) the Union's continued boycott against neutral advertisers; (4) the Union's August 5 letter to neutrals asking them to stop advertising in the SBNP; and (5) Peralta's alleged dishonesty in two respects: claiming that an HIC customer struck him on September 10 and implying in a newspaper article that the SBNP may have set up the confrontation.

ACTION

We conclude that none of the conduct relied on by the SBNP in support of its 8(b)(3) and 8(d) allegations demonstrates that the Union bargained in bad faith. Thus, the Region should dismiss this charge, absent withdrawal.

It has long been established that the Board cannot use 8(b)(3) to regulate a party's use of economic weapons, even where the economic weapons in question are unprotected.³⁷ Moreover, the Board generally does not find bad-faith bargaining based solely on away-from-the-table conduct but rather considers such conduct for the light it sheds on the actual bargaining.³⁸

Here, the Union's actual bargaining has not been found unlawful. The Union's the away-from-the-table conduct alone thus is insufficient evidence of bad faith bargaining. Moreover, the at-the-table conduct on which the SBNP relies is the Union's acknowledgement that the advertiser boycott was intended to pressure the SBNP into reaching a more favorable contract. This statement only establishes that the Union's advertiser boycott was an economic weapon not proscribed by 8(b)(3) under Insurance Agents, supra. Moreover, even if the boycott was an unprotected economic weapon, we would still find no 8(b)(3) violation under Insurance Agents.

As discussed above, the Union's advertiser boycott and related handbilling did not violate 8(b)(4)(ii)(B). This conduct thus does not reflect any bad faith by the Union. Similarly, the Union's August 5 letter to neutral advertisers was lawful and protected and thus not evidence of bad faith. Finally, Peralta's description of his September 10 confrontation with an HIC customer has not been shown to be maliciously false, and in any event, the confrontation was not related to bargaining. Peralta's statements suggesting that the SBNP set up the confrontation were permissible opinions within 8(c).

We thus find distinguishable Board cases finding that a party's conduct away from the bargaining table may demonstrate bad-faith bargaining.³⁹ Reeves Rubber involved

³⁷ NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1960) (finding no 8(b)(3) claim where employees engaged in unprotected partial strike); see also Plumbers and Steamfitters Local 66 (Tri-State Mechanical Contractors), 287 NLRB 583 (1987). We found the Insurance Agents analysis applicable not only to unprotected conduct, but also to unlawful conduct engaged in as an economic weapon. Amalgamated Council of Greyhound Local Unions (Greyhound Lines, Inc.), Case 30-CB-3099, undated Advice Memorandum.

³⁸ St. George Warehouse, 349 NLRB 870, 877 (2007).

³⁹ See Reeves Rubber, Inc., 252 NLRB 134 (1980).

unusual circumstances, not present here, where the employer's away-from-the-table conduct expressly undermined the union's legitimacy as the employees' bargaining representative, producing a more direct impact on actual bargaining. Even assuming that union conduct concerning an employer can be brought under this rationale, the Union's conduct here had no such direct effect on bargaining. Finally, we reject the SBNP's claim that Tri-State Mechanical and thus Insurance Agents do not apply because the Union's conduct here involved dishonesty. The Union's letter to SBNP advertisers only contained a mischaracterization of the status of a charge against the SBNP.⁴⁰ We thus find Insurance Agents' rationale applicable and determinative.

Arguments Regarding Overall Conduct

The SBNP contends that the Union's conduct must be assessed not only as individual events and occurrences, but also by its overall effect. This includes assessing the allegations in Case 31-CC-2169 (July events) in light of the September events raised by Cases 31-CC-2170 and 2171 and 31-CB-12427 and 12429. Considering the issues raised by the SBNP in the aggregate, we conclude that no violations arose, other than the isolated 8(b)(4)(i)(B) inducement involving Spa employee Sanchez.

The SBNP relies first on the overall effect of the alleged disruptive handbilling, including the allegations of intimidation, aggressive statements and body language, and blocking of access. We assessed these allegations separately and found only lawful conduct and no 8(b)(4)(ii)(B) violations. We thus similarly find only lawful conduct and no violations assessing these allegations in the aggregate. We reach a similar conclusion concerning the Union's alleged threats of boycotts and threats of unspecified retaliation.

The SBNP also cites the Union's alleged trespassing by entering businesses, sometimes by a back door, and by initially refusing to leave the parking lot asked, citing

⁴⁰ The flyer's statement that the Board had charged the SBNP with bad-faith bargaining was not technically correct. Nevertheless, the Region both had determined and informed the parties that it would issue complaint. The Union's statement thus was at most a mischaracterization of the Board's action rather than a malicious lie. See Hospital and Service Employees Union Local 399 (Delta Air Lines), 293 NLRB 602, 603 fn. 5 (1989).

Oncore Construction, LLC v. Laborers International Union ECF of North America, 2003 U.S. Dist. LEXIS 26760 (D.D.C. Sept. 30, 2003) (unreported). We find Oncore, a district court case regarding tort-law duties owed to a trespasser, to be clearly distinguishable. Under relevant Board precedent relied upon in the Detroit Newspaper Agency and Service By Medallion Advice memoranda, *supra*, mere trespass alone does not violate 8(b)(4)(ii)(B).

Finally, the SBNP asserts that the Union targeted small businesses to cause ruin or substantial loss to neutral employers, which is unlawful under NLRB v. Retail Store Employees Union, *supra*. As explained above, however, Retail Store is clearly distinguishable.

In sum, addressing the SBNP's overall arguments and assessing the Union's conduct in the aggregate, we conclude that, absent withdrawal, the Region should dismiss of all charges other than the 8(b)(4)(i)(B) regarding Spa employee Sanchez.

B.J.K.